Muhammad Sazrin bin Ismail v Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 1) & Ors

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW APPLICATION NO WA-25–267–09 OF 2018
AZIZAH NAWAWI J
21 JANUARY 2020

Administrative Law — Judicial review — Certiorari — Application to quash decision of third respondent on affirming decision of second respondent — Applicant dismissed from employment — Whether there was double jeopardy — Whether there was non-compliance with Public Officers (Conduct and Discipline) Regulations 1993 and 2002 Regulations — Whether charge framed was without proof and/or evidence — Whether there was breach of natural justice — Whether decision tainted with illegality, irrationality or procedural impropriety

This was an application by the applicant seeking an order of certiorari to quash the decision of the Lembaga Rayuan Tatatertib Perkhidmatan Awam ('the third respondent') which had affirmed the decision of the Lembaga Tatatertib Kumpulan Sokongan (No 1) ('the second respondent') in dismissing the applicant from his employment. The applicant was employed by the government of Malaysia as an immigration officer. A disciplinary investigation was carried out against the applicant when a report was received regarding an allegation that he had submitted government medical certificates which were suspected to be fake. A show cause letter was issued to the applicant pursuant to the Public Officers (Conduct and Discipline) Regulations 1993 ('1993 Regulations') and the applicant submitted a letter of representation. After considering the applicant's representation, the second respondent held that the applicant had failed to exculpate himself in respect of the charge. The second respondent then found him guilty of the disciplinary charge and he was dismissed from service under reg 38(g) of the 1993 Regulations. The applicant was informed of the decision dated 3 December 2017 vide a letter dated 1 March 2018. The applicant had submitted an appeal to the third respondent but rejected. Hence, this application.

Held, dismissing the application with costs:

(1) The principle of double jeopardy only applied in criminal conviction, whereby a person who had been acquitted or convicted of an offence by the court shall not be tried again for the same offence. In the present case, there was no criminal charge issued against the applicant. In any event,

the deduction of the applicant's salary was an administrative action. Therefore, there was no merit on the issue of double jeopardy (see paras 20–22).

(2) The decision of the second respondent could not be said to be irrational or unreasonable, as it was up to the second respondent to make such findings. The applicant had been given his rights under the 1993 Regulations. The second respondent had given due consideration to the applicant's representation and therefore had complied with the procedural requirements of the 1993 Regulations. Regulation 44(1) of the 1993 Regulation did not make interdiction or suspension mandatory, but gave a discretion to the second respondent as to whether to invoke reg 44(1) or not. The disciplinary proceedings ended when the second respondent made a decision to dismiss the applicant during its meeting on 3 December 2017. The letter dated 1 March 2018 informing the applicant of the second respondent's decision was an administrative action and was not part of the disciplinary proceedings. Therefore, the delay in communicating the applicant of the second respondent's decision did not amount to a breach of the 1993 Regulations. With regard to the issue of non-payment of salary and emoluments during the period 3 December 2017 to 1 March 2018, this was purely an administrative matter and the respondents in their affidavit had affirmed that they will make the necessary payment. Therefore, the failure of the respondent to pay the applicant his remunerations did not nullify the disciplinary proceedings. As such, there was no issue on non-compliance with the 1993 Regulations. On the issue of non-compliance with the 2002 Regulations, there was no 2002 Regulations but only amending regulations made in 2002 to amend some provisions of the 1993 Regulations (see paras 24, 26–27, 30 & 32–34).

(3) The second respondent had acted within the 1993 Regulations. The applicant did not dispute the facts that formed the subject matter of the charge, that he had submitted the fake medical certificates to justify his absence from work. Therefore, it was within the powers of the second respondent as to whether to accept the representation and explanation given by the applicant (see para 40).

(4) The applicant did not ask for the relevant documents and also did not dispute the fact that he had submitted the fake medical certificates when he did not seek medical treatment at the said hospitals. There was no request by the applicant for an oral enquiry for the purpose of enabling him to provide further clarification if the second respondent was not satisfied with his representation. Indeed, he gave the reasons or the circumstances for the commission of the offence, that he did not know that the medical certificates were fake. This was not an excuse, as the applicant knew that he would only get the medical certificate if he had

obtained the medical treatment and that he was certified to be sick. Therefore, there was no breach of the principle of procedural impropriety. The applicant was given the full opportunity to state his case (see paras 42 & 45–46).

(5) Nothing could be gainsaid from the letter dated 18 January 2019 as it merely affirmed the position taken by the respondents that they would pay the applicant the said remuneration. This had nothing to do with the disciplinary proceedings. Added to that, the letter was marked 'without prejudice' and it was clearly unreasonable and irresponsible for the applicant to exhibit the letter. As such, the decision made by the second respondent was not tainted with illegality, irrationality or procedural impropriety (see paras 47–49).

[Bahasa Malaysia summary

Ini adalah permohonan oleh pemohon yang memohon perintah certiorari untuk membatalkan keputusan Lembaga Rayuan Tatatertib Perkhidmatan Awam ('responden ketiga') yang telah mengesahkan keputusan Lembaga Tatatertib Kumpulan Sokongan (No 1) ('responden kedua') dalam memberhentikan pemohon dari pekerjaannya. Pemohon diambil bekerja oleh kerajaan Malaysia sebagai pegawai imigresen. Siasatan tatatertib dilakukan terhadap pemohon ketika laporan diterima mengenai tuduhan bahawa dia telah mengemukakan sijil perubatan kerajaan yang disyaki palsu. Surat tunjuk sebab dikeluarkan kepada pemohon menurut Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan 1993') dan pemohon mengemukakan surat representasi. Setelah mempertimbangkan representasi pemohon, responden kedua memutuskan bahawa pemohon telah gagal membebaskan dirinya daripada tuduhan tersebut. Responden kedua kemudian mendapati dia bersalah atas tuduhan tatatertib dan dia diberhentikan dari perkhidmatan di bawah peraturan 38(g) Peraturan 1993. Pemohon dimaklumkan mengenai keputusan bertarikh 3 Disember 2017 melalui surat bertarikh 1 Mac 2018. Pemohon telah mengemukakan rayuan kepada responden ketiga tetapi ditolak. Oleh itu, permohonan ini.

Diputuskan, menolak permohonan dengan kos:

(1) Prinsip pendakwaan dua kali hanya berlaku dalam sabitan jenayah, di mana seseorang yang telah dibebaskan atau disabitkan atas kesalahan oleh mahkamah tidak boleh dibicarakan lagi atas kesalahan yang sama. Dalam kes ini, tidak ada tuduhan jenayah yang dikeluarkan terhadap pemohon. Dalam apa jua keadaan sekalipun, pemotongan gaji pemohon adalah satu tindakan pentadbiran. Oleh itu, tidak ada merit dalam isu pendakwaan dua kali (lihat perenggan 20–22).

(2) Keputusan responden kedua tidak boleh dikatakan tidak rasional atau tidak masuk akal, kerana terserah kepada responden kedua untuk

membuat penemuan sedemikian. Pemohon telah diberikan haknya di bawah Peraturan 1993. Responden kedua telah mempertimbangkan representasi pemohon dan dengan itu telah memenuhi syarat prosedur Peraturan 1993. Peraturan 44(1) Peraturan 1993 tidak membuat larangan atau penggantungan sebagai mandatori, tetapi memberikan budi bicara kepada responden kedua mengenai sama ada akan membangkitkan peraturan 44(1) atau tidak. Prosiding tatatertib berakhir apabila responden kedua membuat keputusan untuk memberhentikan pemohon dalam mesyuaratnya pada 3 Disember 2017. Surat bertarikh 1 Mac 2018 yang memaklumkan pemohon mengenai keputusan responden kedua adalah tindakan pentadbiran dan bukan merupakan sebahagian daripada prosiding tatatertib. Oleh itu, kelewatan dalam menyampaikan keputusan pemohon kedua responden tidak menyalahi Peraturan 1993. Berkenaan dengan isu pembayaran gaji dan emolumen dalam tempoh 3 Disember 2017 hingga 1 Mac 2018, ini adalah perkara pentadbiran semata-mata dan responden dalam afidavit mereka telah mengesahkan bahawa mereka akan membuat pembayaran yang diperlukan. Oleh itu, kegagalan responden untuk membayar gaji kepada pemohon tidak membatalkan prosiding tatatertib. Dengan demikian, tidak ada isu tentang ketidakpatuhan terhadap Peraturan 1993. Mengenai masalah ketidakpatuhan dengan Peraturan 2002, tidak ada Peraturan 2002 tetapi hanya peraturan pindaan yang dibuat pada tahun 2002 untuk meminda beberapa peruntukan Peraturan 1993 (lihat perenggan 24, 26–27, 30 & 32–34).

(3) Responden kedua telah bertindak dalam Peraturan 1993. Pemohon tidak mempertikaikan fakta-fakta yang menjadi perkara sunjek pertuduhan, bahawa dia telah mengemukakan sijil perubatan palsu untuk membenarkan ketidakhadirannya di tempat kerja. Oleh itu, adalah dalam kuasa responden mengenai sama ada untuk menerima representasi dan penjelasan yang diberikan oleh pemohon (lihat perenggan 40).

(4) Pemohon tidak meminta dokumen yang berkaitan dan juga tidak membantah fakta bahawa dia telah menyerahkan sijil perubatan palsu ketika dia tidak mendapatkan rawatan perubatan di hospital tersebut. Tidak ada permintaan oleh pemohon untuk pertanyaan lisan dengan tujuan membolehkannya memberikan penjelasan lebih lanjut sekiranya responden kedua tidak berpuas hati dengan representasinya. Benar, dia memberi sebab atau keadaan untuk melakukan kesalahan itu, bahawa dia tidak tahu bahawa sijil perubatan itu palsu. Ini bukan alasan, kerana pemohon tahu bahawa dia hanya akan mendapatkan sijil perubatan sekiranya dia mendapat rawatan perubatan dan dia disahkan sakit. Oleh itu, tidak ada pelanggaran prinsip ketidakaturan prosedur. Pemohon diberi peluang penuh untuk menyatakan kesnya (lihat perenggan 42 & 45–46).

(5) Tidak dapat dinafikan daripada surat bertarikh 18 Januari 2019 kerana ia hanya mengesahkan kedudukan yang diambil oleh responden bahawa mereka akan membayar gaji tersebut kepada pemohon. Ini tidak ada kaitan dengan prosiding tatatertib. Selain itu, surat itu ditandai 'tanpa prejudis' dan jelas tidak masuk akal dan tidak bertanggungjawab bagi pemohon untuk mengemukakan surat tersebut. Oleh yang demikian, keputusan yang dibuat oleh responden kedua tidak dicemari dengan ketidaksahihan, ketidakrasionalan atau ketidakaturan prosedur (lihat perenggan 47–49).]

Cases referred to

Chai Kok Choi v Ketua Polis Negara & Ors [2008] 1 MLJ 725; [2008] 1 CLJ 113, FC (refd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114, SC (refd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149, FC (refd)

Ketua Polis Negara & Anor v Goh Ching Huat [2011] 3 MLJ 1; [2011] 4 CLJ 237, FC (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417, FC (refd)

Lye Pong Fong v PP [1998] 6 MLJ 304, HC (refd)

Malayan Banking Bhd v Foo See Moi [1981]2 MLJ 17, FC (refd)

Marzuki Abdul Aziz v Ketua Polis Negara & Anor [2003] 3 MLJ 390; [2003] 3 CLJ 315, CA (refd)

PP v Teh Cheng Poh [1978] 1 MLJ 68 (refd)

Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1; [2008] 6 CLJ 573, FC (refd)

T Ganeswaran lwn Suruhanjaya Polis Diraja Malaysia dan satu lagi [2005] 6 MLJ 97; [2005] 3 CLJ 302, CA (refd)

Vijayarao a/l Sepermaniam v Suruhanjaya Perkhidmatan Awam Malaysia [2018] 12 MLJ 17; [2018] 9 CLJ 141, FC (refd)

Legislation referred to

Federal Constitution arts 7(2), 135(2)

Public Officers (Conduct and Discipline) Regulations 1993 regs 4(2), 38(g), 44(1)

Ahmad Fakhri B Abu Samah (Nur Sabrina bt Rusdi with him) (Azwar & Partners) for the applicant.

Natra bt Idris (Deputy Public Prosecutor, Attorney General's Chambers) for the respondents.

Azizah Nawawi J:

APPLICATION

[1] In this application, the applicant is seeking an order of certiorari to quash the decision of the third respondent, Lembaga Rayuan Tatatertib Perkhidmatan Awam dated 2 July 2018 ('the decision') which had affirmed the decision of the second respondent, Lembaga Tatatertib Kumpulan Sokongan (No 1) dated 3 December 2017, dismissing the applicant from his employment.

[2] The grounds of the application are illegality, irrationality and procedural impropriety.

[3] Having considered the application and the submissions of the parties, this court had dismissed the application with costs.

THE SALIENT FACTS

[4] The applicant was employed by the Government of Malaysia ('GOM') as an Immigration Officer, Grade KP19, stationed at Bahagian Penguatkuasaan, Ibu Pejabat Jabatan Imigresen Malaysia, Putrajaya.

[5] A disciplinary investigation was carried out against the applicant when a report was received regarding an allegation that he had submitted government medical certificates which were suspected to be fake from the Serdang Hospital and the Ampang Hospital.

[6] A show cause letter dated 28 December 2016 was issued to the applicant pursuant to the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations') and the disciplinary charge reads as follows:

> Pertuduhan:
>
> Bahawa tuan, Encik Muhammad Sazrin bin Ismail, No. KP: 901021-13-6475, Pegawai Imigresen Gred KP19 semasa bertugas di Bahagian Penguatkuasa, Ibu Pejabat Jabatan Imigresen Malaysia telah didapati mengemukakan empat (4) sijil cuti sakit kerajaan yang disahkan palsu di mana tiga (3) daripadanya adalah dari Hospital Serdang dan satu (1) daripada Hospital Ampang seperti berikut:

Bil	No Siri	Tarikh	Bil Hari	Hospital Yang Mengeluarkan
1.	CKTC No. 939284	07 April 2016	1 hari	Hospital Serdang
2.	M 391866	18 April 2016–19 April 2016	2 hari	
3.	M 392182	2 Jun 2016–3 Jun 2016	2 hari	
4.	CKT C No. 939411	9 Jun 2016–10 Jun 2016	2 hari	Hospital Ampang
		JUMLAH	7 hari	

Perbuatan tersebut membolehkan tuan dikenakan tindakan tatatertib selaras dengan Peraturan 24, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 dan boleh diertikan sebagai melanggar tatakelakuan di bawah Peraturan 4(2)(g) dan 4(2(i), Peraturan-peraturan Pegawai Awam (Kelakuan dan Tataterib) 1993 yang berbunyi seperti berikut:

4(2) Seseorang pegawai tidak boleh —

(g) tidak bertanggungjawab

(f) tidak jujur atau tidak amanah; dan

Jika tuan didapati bersalah atas pertuduhan di atas tuan boleh dihukum mengikut Peraturan 38, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

[7] The applicant was given 21 days to respond to the show cause letter.

[8] The applicant submitted a letter of representation dated 18 January 2017.

[9] After considering the applicant's representation, the second respondent, the disciplinary authority ('DA') held that the applicant has failed to exculpate himself in respect of the charge. The DA then finds him guilty of the disciplinary charge and he was dismissed from service under reg 38(g) of the 1993 Regulations. The applicant was informed of the decision dated 3 December 2017 vide a letter dated 1 March 2018.

[10] Vide a letter dated 8 March 2018, the applicant had submitted an appeal to the Lembaga Rayuan Tatatertib Perkhidmatan Awam (the third respondent).

[11] Vide a letter dated 10 July 2018, the applicant was informed that his appeal was rejected by the third respondent, which had affirmed the finding and decision of the DA.

[12] Aggrieved by the said decision, the applicant had filed this application to quash the said decision. A

THE FINDINGS OF THE COURT

[13] In *T Ganeswaran lwn Suruhanjaya Polis Diraja Malaysia dan satu lagi* [2005] 6 MLJ 97; [2005] 3 CLJ 302, the Court of Appeal, in a matter of reviewing the decision of the disciplinary body, has held as follows: B

> Mengenai perkara ini ingin kami merujuk kepada keputusan House of Lords di dalam kes *Chief Constable of North Wales Police v. Evans* [1982] 3 All ER 141 yang menyatakan: C
>
> > Judicial review is not an appeal from a decision but a review of the manner in which the decision was made, and, therefore the court is not entitled on an application for judicial review to consider whether the decision itself was fair and reasonable. D
> >
> > Judicial review is concerned, not with the decision, but with the decision-making process. Unless the restriction on the power of the court is observed, the court will in my view under the guise of preventing the abuse of power, be itself guilty of usurping power.
>
> Menyentuh soal yang sama di dalam kes *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487; [1988] 1 CLJ 559; [1988] 2 CLJ Rep 390, Edgar Joseph Jr J (beliau ketika itu) di dalam penghakimannya menyatakan: E
>
> > I would at the outset say that in considering these applications I have kept in the forefront of my mind the basic principles to be distilled from a number of cases upon which courts will review decisions of public authorities and inferior tribunals. F
> >
> > The basic principles may be stated thus:
> >
> > (1) judicial review applies to any body of persons having legal authority derived from public law to determine questions affecting the rights of subjects whether that right is derived from statute or from the common law; G
> >
> > (2) the High Court is not a Court of Appeal from the body under review;
> >
> > (3) the High Court limits itself to determining whether the public authority or inferior tribunal has acted lawfully, rationally and with due regard to proper procedures; H
> >
> > (4) the court will not substitute its judgment or discretion for the judgment or discretion of the body under review;
> >
> > (5) facts determined by the body under review are rarely open to review in the High Court; I
> >
> > (6) the High Court will intervene unless there is express statutory direction to the contrary;
> >
> > (7) if there is an established appeal procedure from the decision of the body

A under review the court usually prefers this course to be followed;

(8) only activities of a public nature can be the subject of judicial review ...

[14] Bearing in mind the above principles, the disciplinary charge against the B applicant is premised on reg 4(2) of the 1993 Regulations, namely 'tidak jujur atau tidak amanah' and 'tidak bertanggungjawab'.

[15] In his submissions (oral and written), the applicant had raised the following issues:

C

(a) double jeopardy;

(b) non compliance with the 1993 Regulations and the 2002 Regulations;

(c) the charge framed was without proof and/or evidence; and

D

(d) breach of natural justice; and

(e) letter dated 18 January 2019.

Issue of double jeopardy

E

[16] It is the submission of the applicant that the respondents' act of deducting the applicant's salary for the days that he was absent from duty (without leave) and the issuance of the show cause letter amount to double jeopardy.

F

[17] The protection against double jeopardy in this country is provided by art 7 cl 2 of the Federal Constitution, which reads;

7 (1) ...

G (2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to which he was acquitted or convicted.

H **[18]** In *Public Prosecutor v Teh Cheng Poh* [1978] 1 MLJ 68, Arulanandom J held that a person cannot be said to be in double jeopardy unless he has been convicted or acquitted for the same offence before.

[19] On the same issue of double jeopardy, Justice Suriyadi made the I following finding in *Lye Pong Fong v Public Prosecutor* [1998] 6 MLJ 304 at p 309:

... if a detention order is not a conviction, then surely a restrictive residence order will never qualify. *If no conviction has been recorded, then it follows that the issue of double jeopardy does not arise at all ...* Even if the subject's liberties are curtailed, by

reason of the fact that the normal criminal and preventive laws are complimentary to each other, the concept of double jeopardy as provided by law are inapplicable here. (Emphasis added.)

[20] Therefore, the principle of double jeopardy only applies in criminal conviction, whereby a person who has been acquitted or convicted of an offence by the court shall not be tried again for the same offence. In the present case, there was no criminal charge issued against the applicant.

[21] In any event, the deduction of the applicant's salary was an administrative action premised on General Order 14A, Chapter C, which reads:

14A. Tiada gaji bagi tempoh tak hadir bekerja tanpa gaji

(a) Jika seseorang pegawai yang tidak bekerja bagi sesuatu tempoh tanpa sesuatu sebab yang pada pendapat Ketua Jabatan adalah satu sebab yang munasabah, maka pegawai itu tidaklah berhak mendapat apa-apa gaji atau lain-lain emolumen bagi tempoh tidak hadir bekerja itu; ...

[22] In the premise, I find that there is no merit on the issue of double jeopardy.

Issue of non-compliance with the 1993 and 2002 Regulations

[23] The applicant takes the position that the DA did not comply with the 1993 Regulations in that the applicant was not suspended during the duration of the disciplinary proceedings, that he was continuously working during the period and that he was denied of his salary from 3 December 2017 to 1 March 2018.

[24] In this case, the DA had determined a prima facie case against the applicant and had considered his representation, before making a finding that the applicant had failed to exculpate himself from the charge. I am of the considered opinion the decision of the DA cannot be said to be irrational or unreasonable, as it is up to the DA to make such findings. In *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149, the Federal Court held as follows:

[36] The courts have very limited review powers over administrative determinations of public bodies and are constrained to confirm the findings in disciplinary hearings. The courts will only intervene in disciplinary cases where there was a fundamental procedural flaw. The courts cannot exceed its role in cases of this genre as the instant appeal. *The courts cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence.* Weighing and assessing the evidence is the function of the disciplinary authority which is the body to which the legislature has entrusted the responsibility of deciding the issue, and not the courts. *Hence, the court should approach cases of this genre as the instant appeal in the following*

way, namely, whether there has been an error in the process or whether there was procedural irregularity in the decision making proceedings leading to the public officer's dismissal. (Emphasis added.)

[25] In *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1; [2008] 6 CLJ 573, Tun Zaki CJ held at p 17 (MLJ); p 595C (CLJ):

> [44] From these GOs, it can be clearly concluded that it is the disciplinary authority and not the court who is to decide whether the officer in his written representation has exculpated himself. The answer to Question (iii) must therefore be answered in the negative ie, *that it is not the court but the disciplinary authority who is to decide this question of whether he has exculpated himself by his written representation.* (Emphasis added.)

[26] In the present case, the applicant had been given his rights under the 1993 Regulations. The DA had given due consideration to the applicant's representation and had made a decision that he had failed to exculpate himself in respect of the disciplinary charge. Therefore, I am of the considered opinion that the DA has complied with the procedural requirements of the 1993 Regulations.

[27] With regard to the issue that no interdiction or suspension was taken against the applicant and that he was allowed to continue with his employment during the duration of the disciplinary proceedings, I am of the considered opinion that reg 44(1) of the 1993 Regulation does not make interdiction or suspension mandatory, but gives a discretion to the DA as to whether to invoke reg 44(1) or not. The phrase 'may, if it thinks fit and proper' in reg 44(1) is very clear on this. This is the position taken by the DA as can be seen from para 15.11 of the respondents' affidavit affirmed by Data' Seri Hj Mustafar bin Hj Ali, which reads:

> 15.11 Merujuk kepada perenggan 25, 27 dan 32(d) Afidavit Sokongan Pemohon, Lembaga Tatatertib berpandangan tidak wujud suatu keperluan untuk tindakan penahanan kerja dikenakan ke atas Pemohon sepanjang tempoh prosiding tatatertib dijalankan ke atas Pemohon.

[28] It is also the submission of the applicant that he was only informed of the decision of the DA vide a letter dated 1 March 2018, whereas the dismissal was effective from 3 December 2017. Therefore, the fact that he was required to work after the date of the dismissal shows that there was irregularity in the disciplinary proceedings.

[29] In the affidavit of the respondents, the respondents take the position that the applicant was still required to come to work until the decision of the DA was communicated to him:

13.3 Pemohon perlu hadir bertugas sehingga beliau dimaklumkam berkenaan keputusan dan hukuman tatatertib yang dibuat oleh Lembaga Tatatertib dalam prosiding tattertib yang dijalankan ke atasnya;

[30] I am of the considered opinion that the disciplinary proceedings ended when the DA made a decision to dismiss the applicant during its meeting on 3 December 2017. The letter dated 1 March 2018 informing the applicant of the DA's decision is an administrative action and was not part of the disciplinary proceedings. Therefore, the delay in communicating the applicant of the DA's decision does not amount to a breach of the 1993 Regulations. In *Ketua Polis Negara & Anor v Goh Ching Huat* [2011] 3 MLJ 1; [2011] 4 CLJ 237, the Federal Court held that a letter conveying the decision of the DA is merely communicative and not an integral part of the disciplinary proceedings. The apex court held:

[14] It is *not in dispute that the impugned letter conveying the decision to dismiss the respondent from service was not signed by the person (DW2) who was purported to have written it. The issue is whether such failure has caused the disciplinary proceeding which resulted in the dismissal of the respondent to be flawed.*

...

[18] The remaining question is therefore whether the impugned letter should be considered as an integral part of the disciplinary proceeding which decided to terminate the service of the respondent with PDRM. Put in another way, the issue is whether O 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 or any other the applicable law stipulates that it is the disciplinary authority itself and no other which must sign the impugned letter to convey the result of its the disciplinary proceeding.

...

[21] On careful reading of O 26 above and the relevant provision of the Federal Constitution we do not find any specific requirement for the disciplinary authority to sign the impugned letter conveying its decision to the respondent.

[22] *As such we do not think the impugned letter could be considered as an integral part of the disciplinary proceeding of the disciplinary authority which decided to dismiss the respondent.*

...

[24] We are therefore inclined to agree with the learned trial judge that at best the object of the impugned letter was only communicative. It did not matter who eventually signed it. And there could not be any forgery as DW2 did not make any assertion that such happening while giving his evidence. The Court of Appeal therefore erred in giving too much importance on the signature in the impugned letter without considering the clear provisions of the applicable law. (Emphasis added.)

[31] In *Marzuki Abdul Aziz v Ketua Polis Negara & Anor* [2003] 3 MLJ 390; [2003] 3 CLJ 315, a similar issue arises and the Court of Appeal held as

follows:

> As we have pointed out, the Deputy IGP has been delegated with all the powers to initiate disciplinary proceedings against the appellant under the Instrument of Delegation, PU(B) 621. Vested with that power he had decided to issue the show cause letter, and directed it to be sent to the appellant. This was the first letter. Upon receipt of the appellant's representations the Deputy IGP had deliberated upon them and decided that dismissal was the only punishment to meet the many instances of absence without leave on the part of the appellant. *He had then directed that his decision to dismiss be communicated to the appellant and this was done through the second letter. Under these circumstances we say that the decision making process has been done by the one and only person who has been delegated to do so namely the Deputy IGP. The writing of the two letters does not form part of the decision making process as the two letters merely convey the directives and decisions of the Deputy IGP and form part of the administrative functions of the Deputy IGP for which an officer can be directed to execute.*
>
> The two letters were written on the police letter head and based on the opening words in the two letters as aforesaid, Abdul Aziz must have been a Senior Officer in the police force and the fact that his official status had not been identified on the two letters does not render the decision to dismiss made by the Deputy IGP to be contrary to law. Abdul Aziz does not feature in the decision making process. *What he did was merely to convey the decisions of the Deputy IGP, administrative acts which do not fall within the category of the decision making process.* (Emphasis added.)

[32] With regard to the issue of non-payment of salary and emoluments during the period 3 December 2017 to 1 March 2018, this is purely an administrative matter and the respondents in their affidavit have affirmed that they will make the necessary payment:

> 13.4 Mengambilkira bahawa tarikh kuat kuasa hukuman tatatertib adalah pada 3.12.2017 dan Pemohon telah hadir bertugas sehingga dimaklumkan mengenai keputusan tindakan tatatertib melalui surat bertarikh 1.3.2018, Pemohon adalah layak untuk dibayar upah (gaji dan emolumen) untuk khidmat yang diberikan sepanjang tempoh Pemohon hadir bertugas tersebut.

[33] Therefore, I am of the considered opinion that the failure of the respondent to pay the applicant his remunerations during the period between 3 December 2017 to 1 March 2018 does not nullify the disciplinary proceedings. The non-payment was purely an administrative oversight which the GOM was keen to rectify. As such, I find that there is no issue on non-compliance with the 1993 Regulations.

[34] On the issue of non-compliance with the 2002 Regulations, I am of the considered opinion that there is no 2002 Regulations. What we have is the amending regulations made in 2002 to amend some provisions of the 1993 Regulations, the Public Officers (Conduct and Discipline) (Amendment) Regulations 2002.

[35] In the premise, I find that the decision of the DA did not infringe the 1993 Regulations. A

Issue of no proof and/or evidence of the charge

[36] The disciplinary charge against the applicant is that he was dishonest or untrustworthy and irresponsible for submitting the fake medical certificates. B

[37] Exhibits 'MA6' annexed to the respondents' affidavit shows the letters from Hospital Serdang and Hospital Ampang which confirmed that the medical certificates purportedly issued by the respective hospitals were fake. And it was the applicant who had submitted these fake medical certificates. C

[38] In his letter of representation, the applicant did not denied the charge against him, that he had submitted the fake medical certificates, but sought to explain it in the following manner: D

> 2. *Saya dengan ikhlas hati dan merendah diri ingin memohon maaf atas kekhilafan yang telah saya lakukan. Saya* berada dalam situasi yang mendesak memerlukan saya untuk membantu menyelesaikan masalah keluarga yang tidak putus-putus dilanda musibah yang mana dalam masa sama, *jumlah cuti rehat saya juga semakin berkurang. Saya mengambil keputusan yang singkat dengan mendapatkan Sijil Cuti Sakit yang mana saya dimaklumkan bahawa ianya adalah tulen, sedangkan diluar kawalan pengetahuan saya sijil tersebut adalah tidak tulen.* (Emphasis added.) E

[39] In their affidavit, the respondents have stated as follows: F

> 16.8 *Pemohon dalam representasinya juga tidak menafikan bahawa beliau telah mendapatkan sijil cuti sakit tersebut sedangkan beliau tidak pernah mendapatkan rawatan di hospital-hospital tersebut, sebaliknya pembelaan Pemohon bagi pertuduhan ini hanya menyatakan bahawa adalah di luar kawalan pengetahuan Pemohon sijil cuti sakit tersebut tidak tulen.* G
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> ...
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> 16.12 Tindakan Pemohon mengemukakan sijil cuti sakit kerajaan palsu iaitu sebanyak empat (4) keping sijil cuti sakit membabitkan tujuh (7) hari cuti adalah merupakan suatu *pelanggaran tatakelakuan yang serius* di bawah PPPA (K&T) 1993 dan tidak wajar dilakukan oleh seorang penjawat awam. (Emphasis added.) H

[40] Having considered the applicant's letter of representation, I am of the considered opinion that the DA had acted within the 1993 Regulations. The applicant did not dispute the facts that formed the subject matter of the charge, that he had submitted the fake medical certificates to justify his absence from work. Therefore, it is within the powers of the DA as to whether to accept the representation and explanation given by the applicant. I

Issue of breach of natural justice

[41] The first complaint under breach of natural justice raised by the applicant is that he should have been supplied with all the relevant information. In *T Ganeswaran lwn Suruhanjaya Polis Diraja Malaysia dan satu lagi* [2005] 6 MLJ 97; [2005] 3 CLJ 302, the Court of Appeal held that the officer can have access to the documents if he had applied for them, but not when he did not ask for them. This position was affirmed by the Federal Court in *Chai Kok Choi v Ketua Polis Negara & Ors* [2008] 1 MLJ 725; [2008] 1 CLJ 113, where the Federal Court had reaffirmed the position of law that there was 'no added duty on the disciplinary authority to provide documents without any request being made by the offending officer'.

[42] In the present case, the applicant did not ask for the relevant documents. Added to that, in his letter of representation he did not dispute the fact that he had submitted the fake medical certificates when he did not seek medical treatment at the said hospitals.

[43] The other compliant raised by the applicant is that he was not given an oral hearing before he was dismissed from the employment of the GOM. The latest authority on this issue is the decision of the Federal Court in *Vijayarao a/l Sepermaniam v Suruhanjaya Perkhidmatan Awam Malaysia* [2018] 12 MLJ 17; [2018] 9 CLJ 141, where the apex court made the following findings:

> [71] In short, *'a reasonable opportunity of being heard' or 'a right to be heard' as required under art 135(2) of the Federal Constitution may include an oral hearing, particularly when the officer concerned had requested for it after he had denied all the charges and he seemed to have exculpated himself of the charges against him*.
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> ...
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> [79] *From the authorities referred to above, we are of the considered view that the law as currently adopted by the courts is more inclined in favour of affording a right to be heard orally to an officer facing disciplinary proceedings if there is a request made by him to the disciplinary authority.* As correctly expressed by Richard Malanjum CJ (Sabah & Sarawak) in Yusof Sudin: 'Accordingly I agree with my learned brother Zulkefli bin Ahmad Makinudin FCJ that *'when there is a request by the public officer for an oral hearing after he had denied all the charges and appears to have exculpated himself by furnishing credible evidence in his representation letter*, then by virtue of GO 26(5) of the General Order 1980, the officer should be afforded an oral hearing to satisfy the requirement of art 135(2) of the Federal Constitution ... '. And like my learned brother I too allow this appeal and grant the relief as given by him.
>
> [80] The situation might be different if the officer concerned despite *having made specific request for an oral hearing or enquiry to be held had admitted the disciplinary offences against him as disclosed in the charges but gave the reasons or circumstances for their commission. This was what happened in Gnanasekaran Krishnasamy v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor* [2010] 6 MLJ 441; [2012] 2 CLJ 985; [2011] 2 AMR 765, where this court dismissed the officer's appeal against his dismissal from the public service despite the fact that he had made specific request for an oral hearing but at the same time had admitted to the offences

charged against him and had sought forgiveness and undertook not to repeat the offences in future. (Emphasis added.)

[44] The general principles with regard to the right to oral hearing is that there must first be an application for an oral hearing and that the officer concerned did not admit to the disciplinary charge.

[45] In the present case, there is no request by the applicant for an oral enquiry for the purpose of enabling him to provide further clarification if the DA is not satisfied with his representation. Added to that, the applicant did not dispute the disciplinary charge, namely he had submitted the fake medical certificate when he did not seek medical treatment at the said hospitals. Indeed, he gave the reasons or the circumstances for the commission of the offence, that he did not know that the medical certificates were fake. This is not an excuse, as the applicant knows that he will only get the medical certificate if he has obtained the medical treatment and that he was certified to be sick. Therefore, I am of the considered opinion that there is no breach of the principle of procedural impropreity in the present case.

[46] Added to that, in the cases of *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 and *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417, the apex courts have held that the right to be heard in art 135(2) of the Federal Constitution does not mean a right to be heard orally, but that the officer concerned should be given an opportunity to state his case, as provided by the 1993 Regulations. In these present case, the applicant was give the full opportunity to state his case.

Issue of the letter dated 18 January 2019

[47] The letter dated 18 January 2019 was written by the senior federal counsel to inform the applicant that the related department is willing to pay his remuneration from the date of the dismissal, 4 December 2017 until the date he was communicated of the DA's decision, that is 7 March 2018. Nothing can be gainsaid from this letter, as it merely affirms the position taken by the respondents that they will pay the applicant the said remuneration. This has nothing to do with the disciplinary proceedings.

[48] Added to that, the said letter was marked 'without prejudice' and it is clearly unreasonable and irresponsible for counsel of the applicant to exhibit the said letter. The Supreme Court in *Malayan Banking Bhd v Foo See Moi* [1981]2 MLJ 17 has held that letters written without prejudice are inadmissible in evidence of the negotiation.

A CONCLUSION

[49] Premised on the reasons enumerated above, I find that the decision made by the DA is not tainted with illegality, irrationality or procedural impropriety. As such, the application is dismissed with costs.

B

Application dismissed with costs.

Reported by Nabilah Syahida Abdullah Salleh

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